

***United States Court of Appeals
for the Second Circuit***



APPENDIX

ORIGINAL

& Proof of Service

76-1575

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X

UNITED STATES OF AMERICA, :

Appellee, :

-against- :

REYNALDO RODRIGUEZ, :

Appellant. :

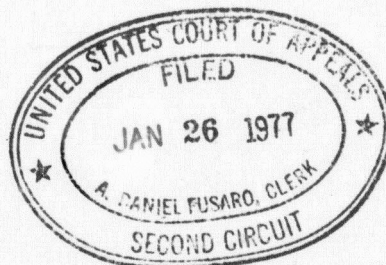
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APPELLANT'S APPENDIX

JESSE BERMAN
Attorney for Appellant
351 Broadway
New York, New York 10013
[212] 431-4600



PAGINATION AS IN ORIGINAL

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INDICTMENT

S 75 Cr. 324

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA :

INDICTMENT

S 75 Cr. 324

REYNALDO RODRIGUEZ and
ADRIAN GARCIA,

Defendants.

COUNT ONE

The Grand Jury charges:

1. From on or about the 19th day of February, 1975, and continuously thereafter up to and including the date of the filing of this Indictment, in the Southern District of New York, REYNALDO RODRIGUEZ and ADRIAN GARCIA, the defendants, and others to the Grand Jury unknown, unlawfully, wilfully and knowingly combined, conspired, confederated and agreed together and with each other to violate Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

2. It was part of said conspiracy that the said defendants unlawfully, wilfully and knowingly would distribute and possess with intent to distribute Schedule II narcotic drug controlled substances, the exact amount thereof being to the Grand Jury unknown, in violation of Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

OVERT ACTS

In pursuance of the said conspiracy and to effect the objects thereof, the following overt acts were committed in the Southern District of New York:

the defendant, ADRIAN GARCIA, went to the area of the 232 Lounge, 232 Eighth Avenue, New York, New York;

(2) On or about the 21st day of February, 1975, the defendants, ADRIAN GARCIA and REYNALDO RODRIGUEZ, had a meeting in the vicinity of the 232 Lounge, 232 Eighth Avenue, New York, New York;

(3) On or about the 21st day of February, 1975, at approximately 2:45 A.M., the defendants, REYNALDO RODRIGUEZ and ADRIAN GARCIA, left the area of the 232 Lounge in a 1967 red Cadillac automobile, New Jersey Registration Number 749 CAP, and proceeded to the vicinity of 25th Street and 8th Avenue, New York, New York;

(4) On or about the 21st day of February, 1975, the defendants, ADRIAN GARCIA and REYNALDO RODRIGUEZ, brought approximately 1/8th of a kilogram of cocaine to the vicinity of 25th Street and 8th Avenue, New York, New York

(Title 21, United States Code, Section 846.)

COUNT TWO

The Grand Jury further charges:

On or about the 21st day of February, 1975, in the Southern District of New York, REYNALDO RODRIGUEZ and ADRIAN GARCIA, the defendants, unlawfully, wilfully and knowingly did distribute and possess with intent to distribute a Schedule II narcotic drug controlled substance, to wit, approximately 117.59 grams of cocaine hydrochloride.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A); Title 18, United States Code, Section 2.)

COUNT THREE

The Grand Jury further charges:

On or about the 21st day of February, 1975, in the Southern District of New York, ADRIAN GARCIA, the defendant, did unlawfully, wilfully and knowingly carry a firearm, to wit, a Webley and Scott, Ltd., .33 caliber revolver, serial number 123779, during the commission of felonies for which he may be prosecuted in a Court of the United States, to wit, the felonies charged in the first and second counts of this Indictment.

(Title 18, United States Code, Sections 921(a)(3)
and 924(c)(2).)

COUNT FOUR

The Grand Jury further charges:

On or about the 21st day of February, 1975, in the Southern District of New York, ADRIAN GARCIA, the defendant, unlawfully, wilfully and knowingly did forcibly assault, resist, oppose, impede, intimidate and interfere with officers and employees of the Drug Enforcement Administration, United States Department of Justice, while said officers and employees of the Drug Enforcement Administration were engaged in, and on account of, their official duties, and in the commission of those acts ADRIAN GARCIA, the defendant, did use a deadly and dangerous weapon, to wit, a revolver.

(Title 18, United States Code, Section 111.)

FOREMAN

PAUL J. CURRAN
United States Attorney

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DISTRICT COURT DOCKET SHEET

JUDGE LORAN 75 Cr. 201

TITLE OF CASE		ATTORNEYS
THE UNITED STATES		For U.S.:
vs. REYNALDO RODRIGUEZ-1-2 ADRIAN GARCIA-1-4		Paul Vizcarrondo, AUSA. 791-1938
		For Defendant:

STATISTICAL RECORD	COSTS	DATE	NAME OR RECEIPT NO.	REC.	DISB.
U.S. Mailed	Clerk				
U.S. Mailed 2	Marshal				
Violation	Docket fee				
Time 21 & 18					
Sec. 846, 812, 841(a)(1), (b), 921(a)(3), 924(c) & 111. resp. to viol. Fed. Narco. Laws. (Ct. 1) ctr. & possess. w/intent to distr. Cocaine, II. (Ct. 2) assess. of weapn dur. felony. (Ct. 3) assault of Fed. Officer w/deadly weapn. (Ct. 4) (Four Counts)					

DATE	PROCEEDINGS
6-75	Filed indictment. (Related to 75Cr201 and referred to Lasker, J.)
7-75	REYNALDO RODRIGUEZ= Deft present (Atty Jesse Berman pres.) enters a plea of NOT GUILTY. Bail cont'd and Deft must call the U.S. Atty's office weekly. 10 Days for motions. --- COOPER, J.
7-75	ADRIAN GARCIA= Deft present (Atty Stuart Holtzman pres.) enters plea of NOT GUILTY. Bail cont'd. --- COOPER, J.
7-75	ADRIAN GARCIA= Filed Notice of Appearance of Atty, Stuart Holtzman, 335 Eway, NYC Tel# 233-3333.
7-75	REYNALDO RODRIGUEZ= Filed Notice of Appearance of Atty, Jesse Berman, 151 Eway. N.Y.C. 10013. Tel# 431-4600.
7-75	ADRIAN GARCIA= Filed Order pursuant to 18 U.S.C. Sec. 424b. Ordered that Dr. Carston Goldin, M.D., a qualified psychiatrist, be employed to examine the Deft. Ordered that said doctor prepare a written report of his findings and conclusions, including his prognosis, and that the original report be submitted to the Hon. Morris E. Lasker, U.S.D.J., on or before April 29, 1975, with a copy of said report to be

(cont'd on Page #2)

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DATE	PROCEEDINGS
	sent to Stuart Holliman, Esq., 334 E. 4th St., New York City, and it is further ORDERED that the Administrative Office of the United States Courts be directed to pay a reasonable fee for the services of Dr. Carolyn Goldin, not to exceed the sum of ONE THOUSAND FIVE HUNDRED (\$1500.00) DORA B. LASKER, J.
10-1-75	ADRIAN GARCIA - Filed Certificate that the U.S. Marshal brought to the U.S. Court the Federal Bureau of Prisons, New York, NY, to the Federal Medical Center at Springfield, Ill., and, at the completion of the psychiatric examination, a letter dated 9/20/75 (10/1/75) days after his arrival at Springfield, Ill., advised in the most professional manner, to transfer the U.S. to the Federal Medical Center at Springfield, Ill., to the Federal Bureau of Prisons, New York, NY, and it is further ORDERED that the defendant be examined at the Federal Medical Center by a qualified psychiatrist to determine the defendant's mental competency to understand the nature of the proceedings against him. LASKER, J. (2 certified copies of said given to the U.S. Marshal-5-11-76)
10-1-75	REYNALDO RODRIGUEZ - Bench Warrant issued.
10-11-75	ADRIAN GARCIA - Mailed original CJA Copy #1 to the A.O., WASH, D.C. for payment. ---LASKER, J.
10-11-75	ADRIAN GARCIA - Filed CJA authorization of Interpreter, Norma S. Seltzer, 20 East 35th Street, N.Y.C. 10016. ---LASKER, J.
11-13-75	REYNALDO RODRIGUEZ - Mailed original CJA Copy #1 to the A.O., WASH, D.C. for payment. ---LASKER, J.
11-14-75	ADRIAN GARCIA - Filed JUDGMENT & COMMITMENT (atty present) The deft. is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of THREE (3) YEARS on each of Counts 2 and 4 to run concurrently and not consecutively with each other. Counts 1 and 3 are dismissed with consent of Govt. on the motion of deft's. counsel. The Court orders commitment to the custody of the Attorney General and recommends that the deft. serve his commitment at the Federal Correctional Institute, Danbury, Conn.Lasker, J. Issued commitment 12-4-75.
*10-03-75	ADRIAN GARCIA - Deft. present - "Garcia" Deft Atty present - Stuart Holliman present Defts. withdraws plea of not guilty & now pleads guilty to counts 2 & 4 Sentence Set for 11-14-75. Lasker J.
12-19-75	ADRIAN GARCIA - Filed Commitment & Entered ret. Deft. delivered to Warden MCC - NYC on 11-14-75.
12-31-75	ADRIAN GARCIA - Filed Magistrate's Temporary Commitment.
1-5-76	REYNALDO RODRIGUEZ Statistically Closed - Deft. is a Fugitive.
1-9-76	REYNALDO RODRIGUEZ - Filed the following papers rec'd from Mag. Gershon. (Mag. #76-1009) Docket Sheet Entry Warrant of Arrest - executed 9-12-76. Criminal Complaint Disposition Sheet Order appointing counsel - Fed. Defender Services Unit. L.A.S.
1-11-76	REYNALDO RODRIGUEZ - Filed Affidvt. for W/H/C & Ad Testificandu. *
1-21-76	REYNALDO RODRIGUEZ - Dft. Reynaldo Rodriguez present w/atty. Jessie Bernard - Dft. withdraws plea of N/G & now pleads Guilty to Ct. 2 of his indictment. Sentence set for Nov. 12, 1976 @ 10 A.M.Lasker J.

(Cont'd)

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PROCEEDINGS

Date Order or
Judgment Filed

9-76 FERNANDO RODRIGUEZ - Filed Writ of Habeas Corpus Ad Testificandum . Writ Satisfied
9-30-76. Palmieri J.

9-76 RODRIGUEZ - Filed CIA 21 Copy 2 - Approving payment to Julie Sayres, 240 West
End Ave. Apt 8C NYC 10023 as dfts. counsle.....Lasker J. 9/21/76.

9-76 RODRIGUEZ - Filed CIA 21 Copy 5 - Appointing Julie Sayres, 240 West End Ave.
Apt. 8C NYC 10023 as counsel for dft.Lasker J. dtd. 9/21/76.

9-76 FERNANDO RODRIGUEZ - Affidavit of proceedings, dated 10-3-76

9-76 FERNANDO RODRIGUEZ - Filed Dfts. Notice of Appeal from the judgment dtd. 11-19-76
(mailed notice)

A TRUE COPY
RAYMOND R. BURGE, JR.

[Signature]

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OPINION OF THE DISTRICT COURT

(from Hearing Transcript, pp. 105-114)

1 MR. BERMAN: I would.

2 THE COURT: Go ahead.

3 MR. BERMAN: Without going into the facts in
4 any detail, there appear to be four statements covered by
5 this morning's testimony or one continuous repetition of
6 essentially the same statement. I will argue that it is
7 more the latter that is a continuous repetition of the
8 same statement or words to the same affect.
9

10 THE COURT: Is there any significant whether it
11 was a continuous repetition or four statements?

12 MR. BERMAN: Somewhere at the first two versions
13 and/or before the second two adequate warnings were given.
14 I think the testimony of Agent McMullan was that finally
15 a full set of warnings at the car, just before they got
16 into the Government's car, which taking the Government's
17 testimony all together would have been at the first two
18 times and before the second two times and my position is
19 that on this record it could not be found that even one
20 full warning was given prior to the first two versions of
21 the statement. Certainly not three out of four Miranda
22 warnings were given prior to the first two statements.
23 At least after those first two statements there may be
24 the absence of adequate Miranda warnings. It becomes a
25 question of whether these can be categorized as spontaneous

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2 or whether they are in response to something law enforce-
3 ment officials did.

4 I think that one, two examples are if a man who
5 walks into a prison and confesses a crime, and the other
6 example is of a man who calls up a police precinct and
7 confesses to a crime.

8 I believe that page 478 of the Miranda opinion
9 -- I believe it is virtually the continuation of the quotes
10 from Miranda which appear at page 2 of the Government's
11 brief.

12 We can set up two poles, which I think everyone
13 agrees to, that if in a custodial statement in response to
14 interrogation of Miranda warnings it is not admissible and
15 if it is a totally spontaneous statement in the absence
16 of the Miranda warnings, it is admissible in this case
17 falls somewhere in the middle.

18 One way of looking at it, which I think is an
19 overlay facile way, is whether it is in response to a
20 question which ends with a question mark and begins with
21 an interrogatory word. I don't think any court would
22 want to stand on that type of ceremony. Obviously, if a
23 police officer confronts a defendant who is in custody
24 with, let's say, a gun seized from the defendant's home
25 and says "We've got the gun, you did it," if the defendant

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2 is asked "Did you do it with your gun?" or "Did it come
3 from your home," it sort of puts the defendant in a posi-
4 tion where if he says anything it is an admission.

5 I think the case falls within the portals of
6 the answer. One has to think about whether the answer was
7 provoked by something said by law enforcement and not
8 think about whether it is a question mark at the end. It
9 is provocative.

10 In this case on the facts as they have been
11 laid down at this hearing there is no question that the
12 statement was not totally spontaneous. It was provoked
13 by what Roberto said. Roberto accused Mr. Rodriguez as
14 being the person on the phone who made the deal over the
15 phone. There was no particularly valid reason for Roberto
16 coming over to the car. It was not part of his role in
17 the case to come over to the car in front of the defendant.
18 It seems to have been a stupid thing to do considering the
19 activity. It is something that Roberto, who was the
20 working informer, took upon himself to do, that is, to
21 come over while the defendant is arrested, handcuffed,
22 about to be warned, to interrupt this process, putting
23 himself on the scene without anybody telling him, and
24 essentially accusing the defendant of having made the deal
25 over the phone, which in retrospect to be probably

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the strongest link in this whole case against Mr. Rodriguez. There is no question but what Mr. Roberto said something "That is the man who made the call to you," which statement provoked what Mr. Rodriguez has said. Each of the three witnesses testified that Mr. Rodriguez did not announce spontaneously that he was not the man on the phone but shortly after Roberto accused him of that.

I think logically he came to where the officer and the defendant confronted with the accusation "We know you are the one who killed Joe Smith," the person feels, yes, self-defense.

If we reach the point that we can agree that it was not totally spontaneous but was provoked by a response to Mr. Roberto, what Roberto said and Roberto had no business being there at the car.

THE COURT: The question is that he have any business being there or not. I think that is irrelevant.

MR. BERMAN: Can we take the Miranda examples of voluntariness, of not taking the extreme spontaneity, but as being in the mainstream of what spontaneity is.

What happened here is light-years away from the class that seems to have been furnished the examples of Miranda. Miranda talks of a person who voluntarily walks into a police precinct.

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2 THE COURT: Miranda doesn't talk of that, but
3 it would perhaps mislead you if I stand there without
4 commenting, if I don't say that it was deliberately done,
5 an extreme case, even though it might not be possible in
6 Miranda. But that was not in the mainstream of voluntari-
7 ness.

8 MR. BERMAN: I see no reason to believe to the
9 contrary, taking those examples right down the middle,
10 but they are examples.

11 THE COURT: Miranda, of course, wouldn't apply
12 in those terms.

13 MR. BERMAN: In any event, those are the people
14 who make the initial contact. Then there is someone who
15 walks in initially, is not in custody, and that is a degree
16 of spontaneity.

17 THE COURT: We've got a case and the question
18 is how to handle it. I think I understand your argument.
19 It is a respectable argument, but I don't need it, how-
20 ever, could be repeated redundantly.

21 MR. BERMAN: Based on the facts of this case
22 we have the fact that Agent McMullan also had his gun out
23 and that the police officer had his gun out. Mr.
24 Schnakenberg said he didn't have his gun out. There is
25 a gun confrontation, not a mere confrontation. A gunpoint

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1 mceb

2 confrontation has to be more severe.

3 THE COURT: It is critical in cases of the
4 fourth amendment. Whether a person is more likely to
5 talk under those circumstances, it seems to me, is hardly
6 questionable. I don't know that there is any evidence to
7 that effect.

8 MR. BERMAN: Also, according to some of the tes-
9 timony, after the shooting happened, which is enough to
10 unseat anyone being in the presence of a shooting when
11 Garcia shot two or three bullets from two or three guns.
12 Schnakenberg emptied his entire gun in the shoot-out.
13 This is enough to unhinge anybody.

14 THE COURT: Miranda does not deal with unhinging
15 It deals with knowing what your rights are or doing things
16 spontaneously.

17 MR. BERMAN: I think it goes to the question
18 of spontaneity and under all the circumstances, in terms
19 of whether the custody was at gunpoint with the shooting
20 and then the provocation being virtually accused by a
21 statement which I think is tantamount to interrogation, all
22 of that happened.

23 The Government cites cases --

24 THE COURT: I haven't even read the Governmen
25 brief.

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2 MR. BERMAN: As I look at those Second Circuit
3 cases in virtually not even one of them there is not a
4 statement from a law enforcement officer which provoked
5 the statement. There were in response to statements by
6 law enforcement people, not in response to questions, but
7 they were allowed because they were not in response to
8 anything.

9 I think the case goes off on this program. It
10 would make a difference between what Mr. Roberto said was
11 a question, because if it was a question there would be
12 no regard -- if it is provoking a response it is tantamount
13 to a question. I can't find anything on all fours with
14 this case. I won't go through that again. If you think
15 about Miranda and the rights that we are supposed to have,
16 surely one of the rights is not to answer any questions,
17 but the more basic right is the right to remain silent.

18 The defendant has been advised that he does not
19 have to say anything, not only in response to questions.
20 Miranda is designed to protect against spontaneous state-
21 ments.

22 THE COURT: Miranda is not intended to head
23 off sponatenous statements. It is intended to head off
24 compelled statements.

25 MR. BERMAN: It is also intended to head off

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2 dubious spontaneous statements.

3 THE COURT: Mr. Berman, I believe you argued
4 sufficiently on the point. You have done your duty to
5 your client. You have made thoroughly understandable the
6 point which is not too esoteric. The facts are plain and
7 clear. I want to call on the Government to reply. I do
8 disagree with your analysis. I think, as I have said,
9 you have made a respectable argument. If we look at the
10 paragraph in Miranda, referred to in the Government's
11 brief, would you also referred me to, page 478, it reads
12 as follows, dealing with statements obtained through
13 interrogation: we do not purport to find all confessions
14 inadmissible. Confessions remain a proper element of law.
15 Any statement given freely and voluntarily without any
16 compelling influence -- the word is compelling -- provoc-
17 ative or provoking is of course admissible, et cetera.

18 I find in the circumstances of this case the
19 statement made by Roberto was not intended to be nor did it
20 in fact add up to be interrogation. To be sure, if it was
21 provocative in the sense that aroused the ire and anger
22 of the defendant -- but I believe the ire and anger was
23 ready, because he recognized Mr. Roberto as someone whom
24 he had trusted and who had become a double agent or a sto-
25 pigeon.

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2 In any event, whatever the particular psychi-
3 atric action of Mr. Rodriguez was, it is evident to me,
4 and I find that the statement which he made was not
5 compelled by the complex of circumstances what you have
6 described, however emotional the admission was at the time.

7 Moreover, we are overlooking of the fact that
8 even if the warnings were not given before the third and
9 fourth statements, as you call them, which really means
10 the second and third repetition of the same statements but
11 not continuous in time, the third and fourth statements
12 were clearly made after the witness or Mr. Rodriguez,
13 that is, had been advised as to what his rights were.

14 I think he knew clearly what he was doing and
15 that there is no basis for suppressing this statement and
16 the motion to suppress is denied.

17 MR. BERMAN: Your Honor, there are two things
18 I want to say to save time. I had not addressed myself
19 to the last two statements and I'm not going to argue now
20 what I would have said. I don't think it changes anything,
21 but his having said the statement twice already before
22 any rights, the cat is out of the bag, it is mere repeti-
23 tion of the same statement.

24 THE COURT: I understood that that was your
25 position. We all know the man can say he doesn't want to

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1 mceb

2 say anything and later on there can be something.

3 MR. BERMAN: I want to waive any more formal
4 effect finding or opinions. Am I correct that the Court
5 finds that the statements were not compelled? Does the
6 Court also find that they were provoked in response to
7 what Roberto said and that the agents in --

8 THE COURT: I think I made my position quite
9 clear on the record.

10 I would like to know whether we will have a
11 further hearing or not. Do you want to consult with Mr.
12 Rodriguez?

13 MR. BERMAN: I want to consult with Mr. Bloch.

14 THE COURT: Consult with whom ever you
15 want and let me know

16 MR. BERMAN: All right.

17 (Pause.)

18 THE COURT: Before we go onto the second
19 hearing, it is getting late and I am holding the jury.
20 I want to choose a jury this afternoon before we go to
21 trial in this case, so if there is a likelihood of that
22 I would like to proceed with calling the jury at the
23 present time and then I will hear Mr. Batchelder.

24 MR. BERMAN: I can't really tell the Court what
25 the answer is because I wanted to have the hearing.

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AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
COUNTY OF NEW YORK) SS.:

NANCY JAINCHILL, being duly sworn, deposes
and says: deponent is not a party to the action, is over
18 years of age and resides at 10 Leonard St., NY 10013

On January 26, 1977, served the within

upon Appellant's Appraiser
Robert B. Fiske, Jr. attorney (x)

for Appellee in this action, at

1 St. Andrew's Plaza
NY NY 10007
the address designated by said attorney (x) for that purpose
by depositing a true copy of same enclosed in a post-paid
properly addressed wrapper, in - ~~post office~~^{an} official
depository under the exclusive care and custody of the
United States Postal Service within the State of New York.

Nancy Jainchill
NANCY JAINCHILL

Sworn to before me on

January 26, 1977.

[Signature]

Notary Public for the State of New York
No. 00000000000
Qualified in New York County
Commission Expires March 30, 1978